

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: August 29, 1996

TO : James J. McDermott, Regional Director  
Region 31

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Valenzuela Engineering Co. 512-5024-3500  
Case 31-CA-22103

This case was submitted for advice as to whether the Employer violated the Act by videotaping job applicants.

### FACTS

In furtherance of an organizing campaign, the Santa Barbara-San Luis Obispo Building Trades Organizing Committee encouraged members to conduct a "mass job application" at the Employer, whose employees are not represented by any labor organization.

On June 10, 1996, approximately 65 individuals, all wearing union insignia on their clothing, arrived at the Employer's premises about 9:15 a.m. and formed a single long line in front of the door to the Employer's office. Michael Fine, chairman of the Organizing Committee, told Jerry Reyes, a management official, that the individuals were "all present to apply for work." Thereafter, Fine noticed a man walking around with a hand-held video camera, apparently videotaping the individuals who were part of the mass application. When Fine told Reyes, "that if this person is [your] employee...our rights were being violated," Reyes immediately took the camera away from the employee. However, Reyes refused Fine's request for the videotape and stated that taking pictures was not a violation of the applicants' rights. Fine did not ask, and Reyes did not explain, why the videotaping had taken place.

The Employer subsequently asserted to the Region that the applicants were videotaped because the employee who was responsible for handing out job applicants works alone in a small office and company supervisors were concerned for her safety and the safety of the applicants. The Employer further asserts that it videotaped the applicants "for

their own legal protection" in the event that anyone was hurt during the application process. There is no allegation that the applicants engaged in any misconduct.

#### ACTION

We conclude, in agreement with the Region, that complaint should issue, absent settlement.

Initially, we noted that the job applicants were engaged in Section 7 activity when they wore union insignia while applying for jobs at the Employer's office.<sup>1</sup>

Next, we noted that the Employer offered no explanation for its videotaping of the job applicants at the time it took such action. It subsequently argued to the Region, without providing any supporting evidence, that it was concerned about the safety of the employee who distributed job applications and that it videotaped the applicants "for their own legal protection...", apparently so it could identify those applicants who were or were not responsible for any misconduct that might occur. Videotaping in the "mere belief" that "something might happen" unlawfully interferes with employee rights.<sup>2</sup> Thus, this case is unlike those in which the Board has found videotaping justified in part because the employer has a reasonable basis, such as prior problems, for obtaining videotaped evidence it could use to support possible trespass or secondary boycott charges<sup>3</sup> or because there is evidence that the videotaping is consistent with the employer's normal security practices.<sup>4</sup>

We realize that this case is factually distinguishable from those in which the employer has no adequate lawful reason for the videotaping and is clearly trying to

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<sup>1</sup> See Midstate Telephone Corporation, 262 NLRB 1291 (1982), enf. denied in relevant part, 706 F.2d 401 (2d Cir. 1983).

<sup>2</sup> See F.W. Woolworth Co., 310 NLRB 1197 (1993).

<sup>3</sup> See, e.g., Concord Metal, 295 NLRB 912, 921 (1989); Ordman's Park & Shop, 292 NLRB 953 (1989).

<sup>4</sup> See, e.g., Lechmere, Inc., 295 NLRB 92, 98-100 (1989).

intimidate or coerce employees engaged in an organizing campaign by giving the impression that it will use the videotaping to identify, and subsequently retaliate against, union supporters.<sup>5</sup> Here, the applicants intended to use their attire and their applications to put the Employer on notice of their identities and their union sympathies. Thus, because the applicants wanted to publicize their union sympathies, it could be argued that the videotaping would not coerce the applicants into either abandoning or concealing their support for the Union. However, since the Employer has not provided any evidence that would justify its videotaping of the applicants<sup>6</sup> in light of the Board's current position on the subject, we conclude that complaint is warranted, absent settlement.

B.J.K.

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<sup>5</sup> See, e.g., Chester County Hospital, 320 NLRB No. 25, ALJD at 16-17 (1995).

<sup>6</sup> St. Mary's Hospital, 316 NLRB 947 (1995), is distinguishable. In that case, the Board held that the employer did not violate the Act by engaging in surveillance of union agents who were attempting to handbill visitors to the hospital. The Board noted that the union agents were not attempting to communicate with employees, so the employer's surveillance could not be said to coerce employees. The Employer here was videotaping applicants for employment with the Employer, not visitors or other unrelated third parties. Since applicants are statutory employees under the Act, Town & Country Electric, 115 S.Ct. 940 (1995), St. Mary's Hospital is inapposite.